

1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF NEVADA
 3 BEFORE THE HONORABLE CARLA L. BALDWIN, MAGISTRATE JUDGE
 4 ---o0o---

4 Robert Armijo, :
 5 :
 6 Plaintiff, :
 7 : No. 3:22-cv-112-CLB-MMD
 8 -vs- :
 9 : September 23, 2022
 10 Ozone Networks, Inc. D/b/a :
 11 OpenSea, a New York :
 12 Corporation Yuga Labs, LLC :
 13 d/b/a Bored Ape Yacht Club, : United States District Court
 14 a Delaware limited : 400 S. Virginia Street
 15 liability company, et al., : Reno, Nevada 89501
 16 :
 17 Defendants. :
 18 _____ :

19 **TRANSCRIPT OF MOTION HEARING**

20 A P P E A R A N C E S:

21 FOR THE PLAINTIFF: Romaine Marshall
 22 Attorney at Law
 23 FOR DEFENDANT OZONE NETWORKS: Jonathan Blavin
 24 Attorney at Law
 25 FOR DEFENDANT YUGA LABS: Katherine Marshall
 Attorney at Law

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26 Proceedings recorded by digital recording produced by
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 29 NEVADA LICENSE NO. 392
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1 Reno, Nevada, Friday, September 23, 2022, 9:51 a.m.

2 ---OoO---

3
4 THE CLERK: The United States District Court
5 for the District of Nevada is now in session. The Honorable
6 Carla Baldwin presiding.

7 This is the date set for a virtual motions hearing
8 in case number 22:cv-112-MMD-CLB, Robert Armijo versus Ozone
9 Networks, Inc., and others.

10 Present by video on behalf of plaintiff, Romaine
11 Marshall.

12 Present by video on behalf of defendants, Jonathan
13 Blavin and Katherine Marshall.

14 THE COURT: Okay. Good morning, everybody.

15 Let me just tell you, I think this case is
16 fascinating and I have been spending far more time than
17 probably I should have reading all of this and being
18 incredibly interested in this. So before we get started --
19 and part of this will probably help you a little bit with your
20 argument -- for those of you that don't know my background, I
21 was a federal prosecutor for eight years, I did complex white
22 collar litigation and cyber cases. So, I am very tech savvy
23 and very familiar with Blockchain, different technologies and
24 things like that. So for whatever it's worth, you don't need
25 to get into that type of thing with me. I do understand it.

1 But, as a result of that, I'm also, like I said,
2 very fascinated by this because I think that this case, in so
3 many ways, seems sort of on the cutting edge of how we're
4 going to deal with these types of things. It's sort of
5 reminded me in an analogy of stolen artwork that we see, you
6 know, lots of cases coming out of, and how that gets handled
7 from the good faith purchasers that then have the artwork
8 after the fact. It's -- you know, as things get transferred.

9 And so, anyway, for whatever it's worth -- and I
10 want to thank everybody for such fantastic briefing, because I
11 don't always see that, and so it was also quite helpful to
12 have such good and well-written briefs, well cited, really
13 kind of digging into those issues.

14 So what we'll do today -- before we get started, I
15 have reviewed the following things, so that you all know: I
16 have reviewed the First Amended Complaint at ECF number 62;
17 the Joint Case Management Conference Report at ECF number 87;
18 the motions to dismiss filed by the defendants in both
19 cases -- or by both defendants, as well as all of the
20 oppositions, replies, declarations, and things like that,
21 and I believe they are ECF 78, 85, 91, 82, 80, 86, 92, as
22 well as the motions to dismiss themselves at 70 and 74. And
23 then, finally, I've also reviewed, obviously, the motions for
24 supplemental authority and the opposition and reply to that.

25 Let me start with this, for what it's worth. There

1 was -- one thing that I did find a bit concerning were some
2 of the comments made in the joint case management report as
3 it related to plaintiff's counsel. Let's be clear, stays
4 of discovery are not automatic. You don't get a stay just
5 because you filed a motion to dismiss. If you have not read
6 my standing order at ECF number 68, you should have done so
7 by now, and for two reasons. Number one, it explains that
8 very clearly. And so asking to have case management
9 conference, you know, joint case management conference,
10 meetings, meet and confers, discussing initial disclosures,
11 all of that, none of that is improper. In fact, that is what
12 is expected and, in fact, demanded by this court and by the
13 district. Just because a motion to dismiss is filed, nothing
14 was improper, nor was it premature to be asking to do that
15 based on the Local Rules, and based on the requirements that
16 we have in this court.

17 So for whatever that's worth, bear in mind I follow
18 the rules, I know the rules, I like the rules, and we're going
19 to play by the rules as we proceed in this case, to the extent
20 that it doesn't get dismissed by the district court.

21 In addition to that, I think it's important, going
22 back to my standing Order, and in particular as it relates
23 to page 5, Footnote 3, I believe of Yuga -- and I think that's
24 how you pronounce it -- motion to stay. There is a comment
25 about a decision made by another magistrate judge in this

1 district related to the standard that applies to motions to
2 stay. My standing order is very clear on the standard that I
3 apply. I do not apply the standard that was cited. More
4 importantly, under Local Rule number IA 7-3(f): "A decision
5 of one district court judge or other magistrate judge is not
6 binding on other district court judge or judges in this
7 district."

8 And so while I appreciate that judge's perspective,
9 I don't agree, and so I apply the Kor Media Tradebay factors.
10 I believe that that's important to have a standard that's
11 fairly high to get stays, and so that is the standard that's
12 applicable as we go forward today. So as we hear argument,
13 please do not refer to the decision that was cited at that
14 footnote or to that standard, that will not be applicable to
15 me here.

16 So this is what we're going to do. We are going
17 to have a little argument. And because I have a lot of
18 questions. And what I plan to do is to give the defendants
19 each about 10 minutes to argue anything that they feel that
20 they need to highlight and also to answer my questions. And
21 then I was going to turn to plaintiff's counsel, probably
22 give you about 15 minutes. I think that's only fair since
23 you're dealing with two different arguments from two different
24 counsel. I have several questions for you as well. I'll give
25 you brief reply, to the extent that I think that's necessary.

1 But, I will keep you pretty firm to the times that I've given
2 you. I only have about 44, 45 more minutes before my next
3 hearing. I know that's crazy, a judge setting a hearing on a
4 Friday. It doesn't usually happen, but that's how I roll, so
5 here we are. And I do have, like I said, some questions for
6 all of you.

7 So I think what we'll go ahead and do, I believe
8 ECF number 78 was the first filed, so we'll go ahead and let
9 you argue first, I believe -- and am I saying it correctly
10 when I say Yuga? Is that right?

11 UNIDENTIFIED SPEAKER: Yes, that's right, Your
12 Honor.

13 THE COURT: Okay.

14 UNIDENTIFIED SPEAKER: It's Yuga Labs.

15 THE COURT: Okay. All right. So let's go ahead
16 and start with you, and you can go from there.

17 MS. MARSHALL: Good morning, Your Honor.
18 Katherine Marshall on behalf of defendant Yuga Labs.

19 The background of this case is simple and
20 undisputed. Plaintiff admits that he, alone, engaged with
21 a stranger on a server that had nothing to do with either of
22 the defendants here, clicked on an unverified link, and
23 allowed a thief to have access to his digital wallet. The
24 thief then, allegedly, stole his NFTs. Noticeably absent in
25 that chain of events is Yuga Labs, which is the developer of

1 the stolen NFTs. And yet --

2 THE COURT: Okay. So I'm very familiar with the
3 facts, if I wasn't already clear, so I'm just going to jump
4 into my question.

5 One of the issues that has been raised by the
6 plaintiff is the need for discovery related to the
7 jurisdictional arguments and, of course, we have general
8 jurisdiction and we have specific jurisdiction. So specific
9 jurisdiction, I don't think, is really at issue. The question
10 becomes a question of general jurisdiction and whether or
11 not the contacts are so sufficient, and so continuous and
12 systematic, as to create jurisdiction here, in spite of the
13 fact that Yuga Labs was, in fact, removed from the sale.

14 The question that I have for you is what objection
15 would you have to a narrow area of discovery? And part of the
16 reason I'm asking this is because the Ninth Circuit case law
17 seems to indicate that a failure to provide that narrow
18 jurisdictional discovery could be an abuse of my discretion.

19 So, number one, what objection would you have
20 to narrow discovery on the issue only of jurisdiction,
21 which I should preface with I would also allow you to do
22 jurisdictional discovery as to the plaintiff if I granted
23 that. So with the sale of the home that is alluded to and
24 whether or not he, in fact, isn't a citizen of Nevada, I think
25 is a good question at this point. So what objection would you

1 have to the narrowing of discovery to that limited issue of
2 jurisdiction as it relates to Yuga Labs and to the plaintiff's
3 residency as it relates to Nevada?

4 MS. MARSHALL: Thank you, Your Honor. So
5 there's a lot to unpack there, so let me start first with
6 jurisdiction as to Yuga Labs.

7 So, certainly, there are cases with jurisdictional
8 discovery is appropriate, but that jurisdictional discovery
9 needs to be necessary in the sense that it will actually
10 change the end result on the motion to dismiss for lack of
11 jurisdiction. And that's simply not the case here. None of
12 the plaintiff's allegations about jurisdiction relate to facts
13 or legal theories that are in dispute here. It's a nationwide
14 club. Interacting with its members doesn't create personal
15 jurisdiction, even if services are provided to the members of
16 the states. So, more information about sales to other Nevada
17 residents or things that are being done with other Nevada
18 residents --

19 THE COURT: I should tell everybody, not only
20 here on the argument, but for the call, please make sure that
21 when you get in front of a Nevada judge, you pronounce it
22 Ne-vad-a and not Ne-vaud-a. It's like fingernails on a
23 chalkboard. So, if you ever end up in front of a jury here --
24 bad. I understand that that's not how it's pronounced other
25 place, but, trust me, you don't want to be that person.

1 So, go ahead. Sorry to interrupt. I'm not trying
2 to be rude. Go ahead.

3 MS. MARSHALL: No. Thank you very much for that
4 clarification, Your Honor. I'll keep that in mind.

5 So the point I was making is that jurisdictional
6 discovery here would not change the ultimate result.
7 Plaintiff talks about these advertisements that were issued
8 by third parties in Las Vegas. And set forth in our
9 declaration, Yuga had nothing to do with those advertisements.
10 But even if those advertisements were related to Yuga Labs --
11 again, which they were not -- it still wouldn't have any
12 relevance to the jurisdictional analysis here because
13 advertisements have no connection to the plaintiff's claims
14 in this case. And the same is true with the sales to other
15 Nevada residents or the contacts in Nevada. They simply just
16 have nothing to do with the plaintiff's claims in this case.

17 THE COURT: I think one of the concerns and
18 questions that I have -- so when we talk about an NFT, as I
19 understand it, it's -- basically it's hash value, right? So
20 there's a digital fingerprint associated with this particular
21 item, and Yuga Labs somehow maintains that information, at
22 least from what I can gather, although that's not entirely
23 clear from the briefing. The argument is that when these
24 entities are sold on a resale market, Yuga Labs somehow
25 receives some sort of percentage back in the sale is that

1 correct?

2 MS. MARSHALL: It's -- it's a little -- it's a
3 little bit more complicated than that, but, generally, no.
4 It depends on how the NFT is sold. In general, there is not
5 a cut that goes to Yuga if it's sold between two independent
6 third parties. For example, in the manner in which -- in
7 which was alleged in this case where the plaintiff would have
8 opened his wallet to somebody else to trade, to trade the NFT,
9 that would have no connection, whatsoever, to Yuga.

10 And then with respect to sales on OpenSea, there
11 is a licensing fee related to the use of the Bored Ape Yacht
12 Club IP by OpenSea, and that's the exchange of money there.
13 It's not related to --

14 THE COURT: So then how does -- how does the
15 noose buyer -- so I buy one of these NFTs from an owner that
16 already has it. They bought it someplace else, whether from
17 OpenSea, or directly from Yuga labs or whatever, but I'm now a
18 new purchaser and I buy that, how is, then, that Yuga Labs can
19 extend the benefits of these different membership aspects,
20 including -- because I think this is a little more than just
21 membership, at least from what I've been described here.
22 This is also opportunities for, like, the Ape coin, and for
23 different new offerings that Yuga Labs has. How does Yuga
24 Labs know to provide that to the new purchaser and not to the
25 old purchaser, if they don't maintain some sort of information

1 as it relates to that NFT hash value, whatever you want to
2 call it?

3 MS. MARSHALL: So -- so the information about
4 who was the cryptographic holder of the NFT is actually
5 contained in the NFT itself. It's not maintained in a
6 database by Yuga Labs. And it's not just Yuga who needs to
7 know who is the cryptographic holder of the NFT. Many of
8 the benefits that are provided to holders of the NFTs are
9 actually from all sorts of third parties all over the country
10 and all over the world, and they're looking at a Blockchain
11 technology within the NFT itself that tells them who the
12 cryptographic owner is. And that's what's so important about
13 this Blockchain technology, is you can look at the asset
14 itself and tell who was the owner, when the sales occurred.
15 That history is included in the NFT.

16 THE COURT: Okay. All right. That actually
17 clarifies quite a bit for me.

18 All right. I guess that actually addresses some of
19 the questions that I have. And so it's within the Blockchain
20 technology itself in terms of how the -- whatever, the way
21 that it's transferred is it's maintained there. So the NFT
22 owner then says this is mine, then they automatically get
23 these offers, or do they have to do something to let everybody
24 know that they -- that that's now, then -- it's now theirs?

25 I mean, I know it's within the Blockchain

1 technology, but it's a little bit -- even for me -- confusing.

2 MS. MARSHALL: So -- sure. So it's automatic
3 within -- within the NFT itself. And so when you look at, in
4 an NFT on the Blockchain, it will show you who owns it --

5 THE COURT: Okay.

6 MS. MARSHALL: -- and so it's not -- sorry.
7 There's something flying outside -- it's not -- it's not
8 something, some database that Yuga maintains or that anybody
9 else maintains. It's inside the Blockchain for that NFT.

10 THE COURT: Okay.

11 Okay. Go ahead and finish.

12 MS. MARSHALL: And another piece of that,
13 just to add, Yuga doesn't have any ability to change that
14 information. And so Yuga has no control. Once these NFTs
15 were distributed, Yuga can't control what happens to them, and
16 can't change who is the cryptographic holder according to the
17 Blockchain. That information is, is not something that Yuga
18 has any ability to change or control in anyway. And that's
19 explained in Yuga's terms on their website.

20 THE COURT: So the -- this is -- and maybe I'll
21 help some of you -- not only you, but anybody else that's
22 going to argue -- so this goes to the question of special
23 relationship. There is no relationship developed because this
24 relationship is specific to the cryptographic holder and the
25 information contained within the NFT technology itself, so

1 there's no independent accounts or some sort of, you know,
2 like with -- you know, I'm trying to think of, like -- here's
3 a good example. So if Tesla is -- for example, you have to
4 have an app, you know, with Tesla to use their super charging
5 network or what have you. So as the Tesla is sold to a new
6 owner, a new owner has to basically create their own new app
7 and then, that way, they can have access to these different
8 things, the updates, the software updates, all of the things
9 that come. But there's nothing like that? They don't sign
10 up -- the way you're describing it, nobody has to sign up to an
11 app to continue these membership relationships --

12 MS. MARSHALL: Uh-huh.

13 THE COURT: -- it's just an automatic thing
14 based on the NFT itself? Is that -- am I describing that
15 accurately?

16 MS. MARSHALL: Yes. You have it exactly right.
17 And it does relate to the question of special relationship
18 because there's nothing -- once the NFT passed the original
19 sale, Yuga has nothing to do with the information in the
20 Blockchain for that NFT. You can't change it. You can't edit
21 it. It has no control over it whatsoever.

22 And, again, it's not just Yuga, but it's also third
23 parties that are looking at who owns the NFTs because a lot of
24 the benefits are provided by third parties, not by Yuga.

25 THE COURT: Okay.

1 I've asked you a lot of questions and used most of
2 your 10 minutes. Is there any, like, specific points that you
3 think that you need to add before I move over to -- I guess
4 it's Ozone, but I'm going to call you OpenSea because that is
5 more clear for me -- so before I move to defendants OpenSea,
6 so, actually, Ozone?

7 MS. MARSHALL: Sure. So I've touched on
8 the idea of special relationship when we talked about
9 jurisdiction. I just want to talk a little bit about,
10 just very briefly, about the competing interests here.

11 So there is, obviously, prejudice to Yuga from
12 starting discovery in this action. There's nothing more
13 unjust than having discovery proceed when there's no
14 jurisdiction, and where the plaintiff can't state a claim.
15 And, obviously, doesn't comport with Rule 1, which favors
16 just, speedy, and inexpensive determination -- or cases.
17 Here, we don't even know what the scope of this lawsuit is
18 going to, or even if it's going to exist after this motion is
19 decided, and so expending the resources, both the parties and
20 the Court, discovery just doesn't make sense here.

21 And on the flip side, the plaintiff hasn't
22 identified any prejudice, whatsoever, from waiting just the
23 short amount of time that we're asking for a stay here. And
24 there's actually prejudice to him for expending the resources
25 to proceed with discovery if the issues may be narrowed.

1 Obviously, you know, Yuga's preserved all relevant evidence
2 and there really is no deference to plaintiff waiting a few
3 months.

4 THE COURT: Okay. Thank you so much for all of
5 the clarification in your argument.

6 I'm going to turn over to counsel for OpenSea,
7 slash, Ozone, or whatever the heck it is. Let me go ahead
8 and get started.

9 MR. BLAVIN: Thank you, Your Honor. Jonathan
10 Blavin on behalf of OpenSea.

11 Although Your Honor is quite correct that the
12 issues here in terms of their context may be novel, we
13 maintain that the legal questions are not novel, and that
14 they're well settled by the Ninth Circuit and several other
15 courts.

16 As plaintiff concedes here, duty is a question of
17 law for the Court, and the question is whether OpenSea had a
18 duty to plaintiff, such that a special relationship existed,
19 which is necessary for a negligence claim relating to third
20 party harm, to prevent or block that harm from occurring.
21 And the Ninth Circuit in the Beckman versus Match.com case,
22 which specifically involved Nevada law, similarly in the
23 Dyroff versus Ultimate Software Group case; and in the Second
24 Circuit, in the Bivachef versus Apel (phonetics) case, which
25 relied on the Beckman case from the Ninth Circuit, all those

1 courts uniformly have held that internet platforms, such as
2 OpenSea, do not have a special relationship with their users,
3 such that there's a duty to prevent a third party harm that
4 occurs.

5 In the Bivachef case, for example, in the Second
6 Circuit, that case involved allegations that users were
7 creating fake accounts, engaged in fraudulent transactions
8 on PayPal. And PayPal said -- citing again the Ninth Circuit
9 in Beckman -- that there was no special relationship that
10 was created between the internet platform PayPal and the
11 user, such that they had to duty to prevent that third party
12 harm. And that's precisely what is alleged here. But, the
13 allegations are even more attenuated.

14 Here, you have an individual who was engaged -- who
15 is the victim of a phishing attack on a third party platform,
16 the Discord platform, then had those stolen NFTs, which
17 again -- and this is critical, Your Honor -- plaintiff
18 concedes in the Complaint -- this is at paragraph 4, and
19 similarly at paragraphs 95 and 96 -- that once those NFTs
20 were stolen on that third party platform, this was permanent
21 and irreversible. There was absolutely nothing that OpenSea
22 could do to prevent that -- those NFTs from being stolen.

23 And, moreover, because those NFTs were stolen, they
24 could be easily sold on other online marketplaces. That's
25 exactly what happened with two of the three NFTs at issue.

1 They were sold on LooksRare, another NFT marketplace --

2 THE COURT: So I need to -- I just -- I
3 apologize. I'm not trying to be rude. But, I know that you
4 have joined the motion to stay from Yuga Labs, but -- which is
5 largely -- well, not largely, but much of it is spent on the
6 question of jurisdiction, but Ozone does not, necessarily,
7 have the same argument as it relates to jurisdiction, correct,
8 because this was --

9 MR. BLAVIN: Correct. We are not asserting a
10 personal jurisdiction argument.

11 THE COURT: Okay.

12 MR. BLAVIN: We filed our own separate motion to
13 stay, Your Honor --

14 THE COURT: No, I understand that. But my point
15 is that you did join theirs, so I'm just trying to make clear
16 what aspects --

17 MR. BLAVIN: Oh, yes, we only joined it in the
18 context that, yes, we are seeking a stay as well. But, we
19 did file our separate own motion -- separate motion to stay,
20 and we are not asserting a separate personal jurisdiction
21 argument.

22 THE COURT: Okay.

23 MR. BLAVIN: That is true.

24 THE COURT: Okay.

25 MR. BLAVIN: And, Your Honor, if you look at the

1 Beckman case, for example, which, again dealt with Ninth
2 Circuit law, the Ninth Circuit made very clear there that
3 Nevada courts have never recognized a special relationship
4 akin to that between an internet platform and its users.
5 And plaintiffs are essentially asking this court, without
6 citing any supporting authority, in even a remotely similar
7 situation, to create a special relationship. And while Your
8 Honor is correct that, you know, it's high burden to establish
9 a stay here, the plaintiffs have not cited any authority.

10 And again, Your Honor is sitting in diversity, as
11 a federal judge interpreting state law, and the burden really
12 is on plaintiff to come forward with any authority sporting
13 the notion that there could be a special relationship here,
14 particularly where the Ninth Circuit has rejected that.

15 Plaintiff has come forward with this idea that
16 because OpenSea purportedly has, you know, a dominant market
17 share in the NFT community, in the marketplace, that there
18 should be a special relationship, plaintiff cites absolutely
19 no authority to support that proposition. In our reply brief,
20 we cited several cases involving much larger internet players,
21 including Google, Apple, Facebook, none of those courts have
22 recognized a special relationship. And, again, these are --
23 these are relationships in which users have accounts. In the
24 PayPal case they have accounts with the internet platform.
25 That doesn't matter for the purposes of the special

1 relationship analysis.

2 And we also cited additional authority --

3 THE COURT: So when somebody goes to sell their
4 NFT on OpenSea, they don't have to create any type of account
5 to do that? Because this transaction --

6 MR. BLAVIN: They have to create --

7 THE COURT: -- took place, as I understand it,
8 the fraudulent transfers effectively did take place through
9 OpenSea, at least the subsequent sales for sure, correct?

10 MR. BLAVIN: The subsequent resale occurred on
11 OpenSea. The fraudulent phishing attack occurred off of
12 OpenSea. That occurred --

13 THE COURT: Right. But the --

14 MR. BLAVIN: -- on Discord.

15 THE COURT: -- initial purchase that
16 Mr. Armijo -- is that how you pronounce his name? I can't
17 pronounce my own name, so, you know, I always ask -- so
18 but he purchased those NFTs originally through OpenSea,
19 correct?

20 MR. BLAVIN: Correct. And he had to create
21 an account to do that. And one of our arguments is in
22 creating that account, he had to agree to OpenSea's terms,
23 which explicitly disclaim liability for third party conduct,
24 including phishing attacks and the resale of stolen NFTs on
25 it.

1 So, yes, he had to create an account and we argue
2 that those terms are binding and controlling here and are a
3 separate independent basis --

4 THE COURT: Right.

5 MR. BLAVIN: -- as to why his claims fail.

6 But we think, Your Honor, the legal issues are very
7 settled that there was no special relationship here creating a
8 duty. And plaintiff does not cite a single Nevada case which
9 would support the existence of the special relationship.

10 But even beyond that, Your Honor, if you look at
11 issues of proximate causation, which are a separate,
12 independent basis of our Motion to Dismiss -- which plaintiff,
13 by the way fails to recognize or even respond to in his
14 opposition to our motion to stay -- there, that is an
15 independent reason why this claim fails. Plaintiff concedes
16 in his complaint that the moment those NFTs were stolen, this
17 was permanent and irreversible. Even if OpenSea had somehow
18 disabled that third NFT from being resold, as plaintiff
19 acknowledges, it would have been resold on another platform.
20 The same exact harm that he's complaining about, he would have
21 suffered even if -- even if that third NFT was blocked by
22 OpenSea because it could be resold as two of the three NFTs
23 were.

24 So this not only establishes that there was no
25 proximate injury or proximate harm -- I'm sorry. Proximate

1 causation between the harm that's alleged and the purported
2 failure of OpenSea to block every sale, it also completely
3 belies plaintiff's theory here that OpenSea somehow had a
4 dominant position in the NFT marketplace, such that a special
5 relationship would be created. Two of the three NFTs here
6 were listed and sold on another NFT marketplace.

7 So for all these reasons, Your Honor, plaintiff has
8 cited no authority to support his position. His claims are
9 barred by the fact that there is no special relationship here
10 creating a duty. There is no proximate causation, much less
11 the fact that the OpenSea terms explicitly disclaim any
12 liability in this type of circumstance, and courts routinely
13 have upheld and enforced those types of terms, most recently,
14 again, in the Apple versus Deep (phonetic) case, which we
15 cited to Your Honor, and including several other cases
16 involving internet platforms.

17 And we haven't addressed the issue of the economic
18 loss doctrine; however, Your Honor, we do think these harms
19 are purely economic in nature. They're not involving physical
20 harm to property or person, and then that's an independent
21 reason why plaintiff simply cannot state out a claim here
22 under the negligence theories that are advanced.

23 THE COURT: Okay. Thank you very much. I think
24 I'm going to move over to the plaintiff because I do have a
25 lot of questions for you and I don't have a lot of time left.

1 So if it's okay with you, sir, I need to jump right
2 into a few questions with you to make sure I get some of the
3 questions answered that I need. Just so you're clear, from
4 my perspective, I see this stay, even if I grant it, as being
5 no longer than maybe six months at the most. I mean that,
6 probably, would be decided by March at the latest, which
7 in -- let's just be honest, reality with the holidays, with
8 Thanksgiving and Christmas and New Year's and the fact that
9 you also, to my knowledge -- and this is one of my direct
10 questions for you -- still have a third defendant that hasn't
11 appeared yet, what would be the true prejudice to you in a
12 short stay of that kind at this point? Bearing in mind that
13 everybody understands their obligations to preserve evidence
14 at this point. Everybody understands their obligations to
15 ensure that ESI evidence is not, you know, spoliated or
16 anything like that.

17 So, what would truly be the harm, especially when we
18 have another party that hasn't even appeared yet, to such a
19 short, minimal stay at this point? Because these are very, I
20 think, complex issues and I think it makes sense that the DJ
21 wrestle with those. And even if she doesn't deny -- or she
22 grants the motion, she may deny it in part and grant it in
23 part, she may narrow the issue, she may allow for amendment
24 that might really alter the scope of discovery. So, having
25 it done by the DJ so that your clear on all of those things

1 before you start discovery, in some ways, makes a lot of
2 sense just under a Rule 1 theory.

3 So if you can explain why that would be prejudicial
4 to your client specifically, that would be helpful.

5 MR. MARSHALL: Yes. Thank you, Your Honor.
6 It's a pleasure to be in a court in Nevada.

7 THE COURT: Look at you. Look at you.

8 MR. MARSHALL: I want to make sure I said that
9 properly.

10 THE COURT: I assume there's no relationship
11 between the two of you.

12 MR. MARSHALL: We might be distant cousins, Your
13 Honor.

14 But, I'm a little handicapped with the way I
15 pronounce things just based on my accent, so I wanted to
16 emphasize that at the beginning, Nevada.

17 To the point, (indiscernible) is where we think
18 we're prejudiced, specifically the speedy part. Although the
19 Court's docket is super full, like all dockets in the federal
20 system right now, in my mind, March is a long way away for my
21 client. And he's got these NFTs that still benefit the
22 holders of them, which aren't him, through the various things
23 that have been created by Bored Ape Yacht Club, the community.

24 So, for example, we reference (indiscernible) --

25 THE COURT: Sir, are you alleging that somehow

1 at the end of this lawsuit you're getting your NFTs back for
2 your client?

3 MR. MARSHALL: That would be -- we would like
4 that, but also we would like the value of what those NFTs
5 would be.

6 THE COURT: So how, exactly, do you -- so how,
7 exactly, do you claim that two parties who were unrelated to
8 the sale of these NFTs, can somehow get those returned to you?

9 Because just so you know, this is how a case
10 normally proceeds in the District of Nevada. You will do
11 discovery. At minimum, it's going to be six months for the
12 discovery period. Most cases, I would say, arguably,
13 discovery lasts much longer than that.

14 You then go to dispositive motions. Dispositive
15 motions are filed. It then takes several months for those to
16 be decided.

17 You then have 30 days after that time to file a
18 Pretrial Order. Usually that gets kicked out a couple
19 months because it takes a lot of time to do a pretrial order.
20 They're not a simple document. And only then do you submit
21 to the district court judge dates for your trial.

22 MR. MARSHALL: Uh-huh.

23 THE COURT: The Court then will set the trial
24 and, oftentimes, that is over a year from the date of the
25 Pretrial Order. So you're talking about two to three years

1 before you even get a trial date, much less have a trial.

2 MR. MARSHALL: Right.

3 THE COURT: So six months, in my mind, in this
4 litigation, it's not very long. So, again -- especially in
5 litigation where I'm having a hard time understanding how you
6 think that your client is going to get their NFT back and
7 their Board Ape memberships back and all of that. This is
8 about damages, as I understand it.

9 MR. MARSHALL: Right.

10 THE COURT: So what, exactly -- and be
11 specific -- is the prejudice to waiting a few months to
12 get a decision before you dive into expensive and extensive
13 discovery?

14 MR. MARSHALL: So we don't think that discovery,
15 at least on the initial issues, would be that expensive or
16 extensive, Your Honor. For example, you had mentioned limited
17 discovery on the jurisdictional issue. As it relates to a
18 two-year schedule, discovery on those issues and other related
19 issues, could keep it on that schedule if we are to do
20 discovery starting -- beginning next week or next month.
21 But to extend out to March, in my mind, the calendar extends
22 two years from that point. And I --

23 THE COURT: So -- but you still don't have a
24 defendant who has appeared yet, correct?

25 MR. MARSHALL: So with respect to LooksRare, we

1 have -- we are in the middle of an investigation as to where
2 they are and who we can serve. We've attempted to serve,
3 but that -- we don't believe that service overseas was
4 dispositive. We believe there are other efforts and ways we
5 can serve a party or someone who is attenuated with LooksRare.
6 So, we will be coming to the Court within the next few weeks
7 with other ways to serve process on LooksRare.

8 THE COURT: So, here's my concern. When they
9 make their appearance -- assuming you can properly serve
10 them and obtain jurisdiction, at least for purposes of the
11 Complaint and filing a Motion to Dismiss -- we will now then
12 be in the position of potentially having to restart discovery
13 and duplicate discovery because a party isn't here yet.

14 MR. MARSHALL: Right. And we may never get them
15 here, Your Honor. It's prejudicial for us to have to wait for
16 that possibility.

17 THE COURT: Okay. So you still have not
18 explained to me, though, how a short stay of discovery is,
19 in fact, actually prejudicial, so --

20 MR. MARSHALL: Yeah. Justice -- Justice
21 delayed is justice denied, Your Honor. That overall concept
22 of why do we have to wait, when we can ask questions without a
23 reasonable (recording cut out) we have to.

24 THE COURT: Well, the point of waiting is
25 because of Rule 1. And it's more than just delay. It's

1 expense.

2 MR. MARSHALL: Yes. Understood. And its --
3 we're the plaintiff, and he's an individual against two
4 companies that, as we've asserted in our Complaint, have made
5 tens of millions within six --

6 THE COURT: Okay. Here -- let's move past that.

7 MR. MARSHALL: Okay.

8 THE COURT: Let's assume that I agree with you
9 that there's some prejudice to either a short stay when you
10 don't have every party here. Let's just assume that for a
11 second.

12 MR. MARSHALL: Okay.

13 THE COURT: The problem that I have, and I think
14 it's going to be an issue for you in the Motion to Dismiss
15 because part of what I need to do is take a preliminary look
16 at the motion, obviously, to make a determination, in my mind,
17 whether or not a stay is appropriate because it's -- the case
18 law varies between being firmly convinced, being convinced,
19 and feeling that it's a meritorious motion. And I think I
20 probably fall someplace in the middle of all of that. Your
21 theory is this: OpenSea and Yuga Labs had a duty to you
22 through this special relationship that you claim was created
23 to prevent, effectively, the fraudulent sale and to take
24 action once they were notified of the fraudulent sale.

25 Is that just -- am I correct?

1 MR. MARSHALL: Yes.

2 THE COURT: Okay.

3 MR. MARSHALL: Yes. Yes, Your Honor.

4 THE COURT: But here's the problem, the flip
5 side of that, your theory would also, I think, call into
6 question whether they would then owe a duty to the good
7 faith purchaser because you're asking them to just take your
8 client's word for it that there was a fraudulent transfer,
9 with no proof that it was fraudulent. So if they take action,
10 don't they then create another set of liability and potential
11 duties and other things to the other side?

12 So, from a policy perspective, how does that make a
13 lot of sense?

14 MR. MARSHALL: So regarding the policy, Your
15 Honor, to put a finer point on our theory, it's with failure
16 to see these foreseeable frauds and sales happening, and to do
17 anything about it, to just say we're only a platform is --

18 THE COURT: But how do they know that the
19 independent sales between two users, how are they supposed to
20 foresee that that is a fraudulent transfer?

21 In other words, how do they know that your client is
22 going to let somebody voluntarily into their house to then
23 steal things? Because that's what he did when he --

24 MR. MARSHALL: Yeah.

25 THE COURT: -- voluntarily let them into his

1 digital wallet.

2 MR. MARSHALL: Yeah. And we're saying that that
3 was foreseeable that that could happen.

4 THE COURT: Foreseeable that your client
5 wouldn't use protections against his own negligence of letting
6 somebody into his digital wallet by clicking on a link from
7 somebody he doesn't know?

8 MR. MARSHALL: Foreseeable that by failing to
9 implement any adequate security measures, by failing to
10 monitor the marketplace that they created, therefore
11 failing --

12 THE COURT: But, again, that is independent upon
13 their, A, knowing that this is a fraudulent sale of some sort.

14 MR. MARSHALL: Nothing that these fraudulent
15 sales have been occurring, that was --

16 THE COURT: But how are they supposed to know
17 they're fraudulent, and they're not in good faith? How are
18 they supposed to distinguish between those things?

19 I guess that's the corps question: How do they,
20 third parties unrelated to the transaction, not involved in
21 the communications between the buyer and the seller -- it's no
22 different -- let me give you an analogy.

23 MR. MARSHALL: Okay.

24 THE COURT: And I use this for my own
25 experience. As a prosecutor, I prosecuted a case involving

1 eBay, where people were going out and stealing products from
2 Target and Wal-Mart and all of this, they then sold it to a
3 fence. The fence then put it on eBay and sold all those
4 products to good faith purchasers on the other end.

5 But under your theory, eBay is supposed to know that
6 these products that are placed on there are stolen.

7 MR. MARSHALL: Well my --

8 THE COURT: -- before --

9 MR. MARSHALL: Well my theory --

10 THE COURT: -- before anything -- but not being
11 involved in any of these steps over here. They're not privy
12 to any of these communications. But under your theory a duty
13 is created to know that something placed on OpenSea, for
14 example, was inappropriately listed for sale.

15 MR. MARSHALL: Yeah. Thanks. That analogy is
16 helpful, Your Honor.

17 And it's not a duty to know, but it's a duty to do
18 those things so that the fence, in the eBay analogy doesn't
19 exist, so that these types of frauds aren't happening with
20 such regularity.

21 So, in other words, implement adequate security,
22 monitor the marketplace --

23 THE COURT: But what, exactly, would the
24 adequate security be? And part of this comes from information
25 that I gleaned from Yuga Labs. If the NFT, itself, and

1 not some private, separate account, or relationship or
2 communication is itself holding the data, the information of
3 who owns the NFT at that point, what, exactly -- is there even
4 technology available that could allow them to put some sort
5 of process in place? Because I don't see how that's even
6 possible with the way Blockchain works.

7 MR. MARSHALL: I'm not sure how to answer that
8 technology question. It seems a factual, some type of factual
9 question that we will get into in this case. But what we say
10 the relevant conduct here is, that creates the facts that give
11 this court the ability to deny the motion to stay are, fraud
12 happens on the platforms; fraud happens within the community
13 because failings have been committed by the two defendants
14 here. Failure to implement adequate security to even know if
15 there's -- if there is fraud happening; or for even recourse
16 to the victims, Armijo, by calling -- casting a service, that
17 those channels just weren't adequately set up there, Your
18 Honor.

19 And so it relates to -- we're not saying they caused
20 the fraud, but they created a platform and a community by
21 failing to do a basic thing --

22 THE COURT: Well, I could make the same argument
23 for Apple, for eBay, for PayPal, for virtually any online
24 digital marketplace that allows for the transfer of
25 information and goods between parties. And yet, in many

1 cases -- in fact I was unable to find any case that supports
2 the theory that you've advocated in this case.

3 MR. MARSHALL: Which is that they create a safe
4 or secure community and platform?

5 THE COURT: That there is a special relationship
6 created between independent buyers and sellers that utilize
7 those platforms to transfer, whether it be money in the PayPal
8 example, or goods in the eBay example, or even the Apple
9 example, where they allow for information and data to be
10 utilized between parties.

11 MR. MARSHALL: Okay. And I think where the
12 analogy with those companies -- that's where it breaks down
13 because, here, the relationship formed on the platform or
14 through the community is much deeper than just the process of
15 a payment or the selling --

16 THE COURT: So much deeper than when you go to
17 PayPal and you have to provide them all of your personal data
18 and information, including bank account information, to be
19 able to utilize their platform to transfer money, wherein in
20 this case, based upon the information contained entirely
21 within a digital hash value of an NFT, where there is no
22 independent account required to be created between the
23 parties, you're saying there is more of a special relationship
24 or some sort of relationship created?

25 MR. MARSHALL: Yes. Absolutely, Your Honor.

1 THE COURT: Okay. Your time --

2 MR. MARSHALL: That has been --

3 THE COURT: -- your time has expired. So thank
4 you very much, sir. I really do have to -- we only have a few
5 more minutes before this hearing is over and I have to go to
6 my next hearing.

7 I have heard the arguments of all the parties. I
8 have reviewed all of the briefing as I've already indicated.
9 And like I said, I -- I don't know what she's going to do, in
10 all reality. I think these are fascinating issues. And I
11 would sit here all day and have these questions. We could
12 spend all afternoon together -- not that you want to do that.
13 But I would, but that's a different issue.

14 But just all of the information I've gleaned from
15 the answers that I have received here today, and as well as
16 from the motions, first of all, I find that there is no
17 dispute between the parties that the motions are, in fact,
18 dispositive as it relates to the elements required under
19 Kor Media and Tradebay. There is a bit of an argument between
20 the parties, at least Yuga Labs and plaintiffs, as to whether
21 or not some limited jurisdictional discovery needs to happen,
22 but I find that there is not a requirement for that under the
23 circumstances. Much of the facts or circumstances needed to
24 make a determination both to general and specific jurisdiction
25 have, effectively, been acknowledged by Yuga Labs in terms of

1 their involvement, their sales, their -- you know, they have
2 provided declarations and information that I think go to
3 those issues that the district court can decide. If she
4 disagrees with me, she can, certainly, open up discovery
5 on that issue. But as far as I sit here today, I do not
6 believe that discovery is necessary to decide the Motions to
7 Dismiss as they're presented to the district court judge at
8 this time.

9 With respect to the preliminary peek, that is
10 probably the hardest one of the elements. And again, it
11 goes back to, you know, do I need to be firmly convinced that
12 she's going to grant the motion; or do I need to be convinced
13 that this motion has merit and that it may be granted, even
14 in part, as it relates to the district court judge?

15 I do think that there are some really -- like I
16 said, I think that there's some fascinating issues here. And
17 I think a part of it just comes from the very nature of the
18 technology that, really, the courts have not yet wrestled
19 with and have not had to come up with some sort of framework,
20 somehow, to deal with it. Even the analogies that we've used
21 here today aren't perfect. They don't fit. They -- these
22 technologies are different. NFTs are different.

23 Certainly, I appreciate all that plaintiff laid
24 out, not only in the Complaint, but in their motions
25 about all of the membership benefits, the access to the

1 cryptocurrencies, the -- all of the things that come along
2 with membership of owning these entities really does, I think,
3 in some ways, give me a lot of pause about whether or not
4 there really is the type of -- if this doesn't change, somehow
5 that relationship, when we look at the case law in Nevada and
6 what is and is not a special relationship, specifically under
7 Perry versus Jordan and different cases that really discuss
8 what that means.

9 But at the end ever the day, I am confident that
10 there is a meritorious Motion to Dismiss that has been
11 presented to the district court judge. I am also convinced
12 that a short stay of discovery for only a few months --
13 particularly where we don't have a third defendant that
14 has not been served yet here present -- is appropriate under
15 Rule 1. I understand the prejudice, but I think that that
16 prejudice is minimal in comparison to the expense and the
17 nature of discovery that would be necessary in this case
18 ultimately.

19 And so for those reasons, I am going to grant both
20 of the Motions to Stay. I believe they're at ECF number --
21 hold on. Let me make sure the record is clear.

22 And of course the one page I need, I can't find.
23 See, I make these nice little tables. You can't see.

24 So, ECF number 78 is granted. ECF number 80 is
25 granted. I'm also going to grant the motion for supplemental

1 authority -- although, to be honest with you, I didn't find it
2 all that necessary to the decision here, but I don't see any
3 fault in pointing out to the Court that there is new cases
4 that I might need to be aware of.

5 So, I'm granting all three of those motions. The
6 motion is like this though. So if the district court judge
7 denies the Motion to Dismiss, within 21 days of the order
8 denying those motions, whether she grants motion for leave to
9 amend or not, or whatever she does or doesn't do, if any part
10 of this case proceeds, the parties are required to file an
11 updated Discovery Plan and Discovery Order within 21 days of
12 the order related to the Motion to Dismiss, if any part of
13 this case survives the Motion to Dismiss, and then we will
14 discuss how we will proceed with discovery.

15 It is unlikely I will continue to allow unlimited
16 stays. We may look at what she does and then decide, okay,
17 look, let's do some narrow areas because she has allowed
18 amendment and it appears that she's going to allow the case to
19 proceed in certain areas, even if -- you know, like I said,
20 she allows for an amendment and motions to dismiss could be
21 subsequently filed. But, that will be the order of the Court.

22 I should, again, thank all of you for being so well
23 prepared for here today, and for the amazing arguments. And
24 in some ways I hope she doesn't dismiss this case because I
25 would be very, very excited to work with all of you on a going

1 forward basis. But with that, we will be in recess.

2 Thank you all so much.

3 MR. BLAVIN: Thank you, Your Honor.

4 MS. MARSHALL: Thank you, Your Honor.

5 MR. MARSHALL: Thank you, Your Honor.

6
7 (Court Adjourned.)
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I certify that the foregoing is a correct
transcript from the record of proceedings
in the above-entitled matter.

\s\ Kathryn M. French

October 6, 2022

KATHRYN M. FRENCH, RPR, CCR
Official Reporter

DATE